

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW MEXICO**

UNITED STATES OF AMERICA,

Plaintiff/Respondent,

vs.

No. CV 16-00882 LH/KRS
No. CR 11-01204 LH

WARREN RIVERA,

Defendant/Movant.

**ORDER ADOPTING MAGISTRATE JUDGE'S PROPOSED FINDINGS AND
RECOMMENDED DISPOSITION AND GRANTING MOTION TO
CORRECT SENTENCE PURSUANT TO 28 U.S.C. § 2255**

THIS MATTER is before the Court on the Magistrate Judge's Proposed Findings and Recommended Disposition ("PFRD") filed April 18, 2017 (CV Doc. 18; CR Doc. 194) and on the Movant Warren Rivera's Objection to the Magistrate Judge's PFRD filed May 2, 2017 (CV Doc. 19; CR Doc. 195). The Court will adopt the Magistrate Judge's PFRD, overrule Movant Rivera's Objection, and grant Rivera's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 178).

In her PFRD, the Magistrate Judge recommended that the Court deny Movant Rivera's claim that his prior convictions for aggravated assault (deadly weapon), aggravated battery against a household member (great bodily harm), and aggravated assault against a household member (deadly weapon) no longer qualify as violent felonies under the holding in *Johnson v. United States*, 135 S. Ct. 2551 (2015). (CV Doc. 18 at 2-6; CR Doc. 194 at 2-6). The Magistrate Judge also recommended further briefing on Movant Rivera's claim that one of his aggravated assault charges was resolved by the State of New Mexico through a conditional discharge, rather

than a conviction, and therefore does not qualify as a predicate conviction for purposes of an enhanced sentence under the Armed Career Criminal Act, 18 U.S.C. § 924(e)(2)(b), and whether the one-year statute of limitations in 28 U.S.C. § 2255(f) would bar that claim. (CV Doc. 18 at 4-7; CR Doc. 194 at 4-7).

Movant Rivera objected to the Magistrate Judge's recommendation that his claim based on *Johnson v. United States* be denied. (CV Doc. 19 at 1-2; CR Doc. 195 at 1-2). Rivera did not object to the Magistrate Judge's recommendation for further briefing on his claim of conditional discharge. (CV Doc. 19 at 2; CR Doc. 195 at 2). On May 3, 2017, the United States filed its Response to the PFRD, conceding Rivera's conditional discharge claim and waiving its procedural defense of the § 2255(f) statute of limitations. (CV Doc. 20; CR Doc. 196).

The Court has reviewed the PFRD, the Movant's Objection, the United States Response, and the record in CR 11-01204 LH. Based on the holding in *United States v. Maldonado-Palma*, 830 F.3d 1244 (10th Cir. 2016), the Court concurs in the Magistrate Judge's recommendation that Movant Rivera's claim under *Johnson v. United States* be denied. The Court overrules Rivera's objection and adopts the PFRD. The Court also finds that, based on the United States' concession of Rivera's conditional discharge claim and waiver of the procedural defense of the statute of limitations, Rivera no longer has three predict convictions necessary for an enhanced sentence under 18 U.S.C. § 924(e)(2)(b). The Court concludes that Rivera's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 178) should be granted and Rivera should be resentenced.

IT IS ORDERED:

- (1) Defendant/Movant Warren Rivera's Objection to Magistrate Court's Proposed Findings and Recommended Disposition (CV Doc. 19; CR Doc. 195) is **OVERRULED**;

- (2) the Magistrate Judge's Proposed Findings and Recommended Disposition ("PFRD") filed April 18, 2017 (CV Doc. 18; CR Doc. 194) is **ADOPTED** as an order of the Court;
- (3) Rivera's Motion to Correct Sentence Pursuant to 28 U.S.C. § 2255 (CV Doc. 1; CR Doc. 178) is **GRANTED**; and
- (4) a hearing will be set to resentence Defendant/Movant Warren Rivera in a separate order.



SENIOR UNITED STATES DISTRICT JUDGE